



**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA**

**Alexandria Division**

JAY NEIL, et al.	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 1:13-cv-644
v.	)	
	)	
WELLS FARGO BANK N/A, et al.	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION**

This matter comes before the Court on Defendants BWV Law Group, LLC ("BWV") and Wells Fargo Bank, N.A.'s ("Wells Fargo") (collectively "Defendants") Motion to Dismiss Plaintiffs Jay and Erika Neil's ("Plaintiffs") First Amended Complaint ("Complaint"), Plaintiffs' Opposition to Defendants' Motion to Dismiss, and Defendants' Reply in Support of Their Motion to Dismiss. This action stems from the foreclosure of a property located at 15284 Surrey House Way, Centreville, Virginia ("Property") for which Plaintiffs executed a Deed of Trust and secured a promissory note in the amount of \$604,000.

On June 17, 2005, Plaintiffs obtained a loan in the amount of \$604,000, secured by a Deed of Trust on the Property. Wells Fargo was the original lender and servicing agent for this loan. On November 1, 2009, Plaintiffs applied for a loan modification under the Home Affordable Modification Program ("HAMP") and

signed a Trial Period Plan ("TPP"). Plaintiffs claim Wells Fargo representatives promised Plaintiffs that they would receive a permanent loan modification if they continued to make timely TPP monthly payments. Wells Fargo denied Plaintiffs' request for a modification on September 1, 2010. On March 7, 2013, the Property was purchased at a foreclosure sale by Defendant Banc of America Funding Corp., 2005-4 Trust. In their ten-count Complaint, Plaintiffs seek to overturn the foreclosure sale, claiming they were entitled to a loan modification under HAMP.

Defendants now move to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants contend that Plaintiffs have no legal right to a loan modification under HAMP and plead no other basis to challenge the foreclosure sale of the Property. On these grounds, Defendants allege that Plaintiffs have failed to state a claim for relief and that the Complaint should therefore be dismissed with prejudice.

In order to survive a Federal Rule of Civil Procedure Rule 12(b)(6) motion to dismiss a complaint must set forth "a claim for relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007). The court does not have to accept "unwarranted inferences, unreasonable conclusions, or arguments." E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship, 213 F.3d 175, 180 (4th Cir. 2000). A claim is facially plausible "when the plaintiff pleads factual content that allows the court

to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009); Twombly, 550 U.S. at 556. “A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009); Twombly, 550 U.S. at 555. Further, “conclusory allegations regarding the legal effect of the facts alleged” need not be accepted. Labram v. Havel, 43 F.3d 918, 921 (4th Cir. 1995).

Plaintiffs have conceded their claims for Breach of the Covenant of Good Faith and Fair Dealing (Count VI), Promissory Estoppel (Count VII), and Violation of RESPA (Count X). Therefore, these claims should be dismissed with prejudice.

Count I of Plaintiffs’ Complaint alleges Breach of Contract. Plaintiffs claim Wells Fargo breached its contractual obligations under the TPP, including its obligation to provide Plaintiffs a permanent loan modification. This claim fails because Plaintiffs have no contractual right to a loan modification. Nash v. Green Tree Servicing, LLC, 2013 U.S. Dist. LEXIS 63157 (E.D. Va. May 2, 2013); Asbury v. America’s Servicing Co., 2011 U.S. Dist. LEXIS 87552 (E.D. Va. July 12, 2011). Moreover, the TPP merely required Plaintiffs to remit mortgage payments – something they were already required to do. Therefore, the TPP is not supported by consideration and does

not constitute an enforceable contract. Zeller v. Aurora Loan Servs., 2011 Va. Cir. LEXIS 210 (Mar. 9, 2011). Accordingly, the Court grants Defendants' Motion to Dismiss as to the Breach of Contract claim in Count I.

Count II of Plaintiffs' Complaint alleges Slander of Title. To prevail in a cause of action for slander of title under Virginia law, a plaintiff is required to allege facts showing "(1) the uttering and publication of the slanderous words by the defendant, (2) the falsity of the words, (3) malice, (4) and special damages." Allison v. Shapiro & Burson, LLP, 2009 U.S. Dist. LEXIS 108040 (W.D. Va. Nov. 19, 2009) (quoting Lodal v. Verizon Va., Inc., 74 Va. Cir. 110, 2007 WL 1360893, at \*5 (Va. Cir. Ct. 2007)). Plaintiffs fail to allege slanderous or false words and concede that they were not current on the Note at the time of the foreclosure sale. The foreclosure sale occurred because the Plaintiffs were in default; thus, no cause of action arises under Slander of Title. Accordingly, the Court grants Defendants' Motion to Dismiss as to the Slander of Title claim in Count II.

Count III of Plaintiffs' Complaint alleges Abuse of Process. Plaintiffs claim that Defendants abused the process to force Plaintiffs into accepting usurious terms on any delinquent amount Defendants indicated was past due. This claim fails because Plaintiffs were merely asked to make payments under the

original terms of their loan. The Court grants Defendants' Motion to Dismiss as to the Abuse of Process claim in Count III.

Count IV of Plaintiffs' Complaint is a claim to Remove Cloud on Title. This claim fails because Plaintiffs do not allege that they have satisfied the debt encumbering the Property. Accordingly, the Court grants Defendants' Motion to Dismiss as to the claim to Remove Cloud on Title in Count IV.

Count V of Plaintiffs' Complaint alleges Tortious Interference with Contract. "A principal and an agent are not separate persons for purposes of a conspiracy or tortious interference action and, likewise, cannot conspire with each other or interfere with their own contractual relationship." Ashco Int'l Inc. v. Westmore Shopping Ctr. Assoc., 42 Va. Cir. 427 (1997) (citing Brauer Co. v. Nationsbank of Va., 466 S.E.2d 382 (1996)). Wells Fargo serviced the loan as an agent of the lender and acted within the scope of its agency when processing Plaintiffs' request for a loan modification. Therefore, as an agent of the lender, Wells Fargo cannot interfere with the relationship between the lender and borrower. Accordingly, the Court grants Defendants' Motion to Dismiss as to the Tortious Interference with Contract claim in Count V.

Count VIII of Plaintiffs' Complaint alleges Breach of Fiduciary Duty. Without a successful modification, Wells Fargo was free to exercise all the rights and remedies under the Note

and Deed of Trust. Plaintiffs were in default, and Equity Trustee's, LLC properly proceeded with the foreclosure sale. Therefore, this claim must be dismissed. Accordingly, the Court grants Defendants' Motion to Dismiss as to the Breach of Fiduciary Duty claim in Count VIII.

Count IX of Plaintiffs' Complaint alleges Equitable Action to Rescind the Sale. There is no equitable claim to rescind a foreclosure sale in Virginia. Accordingly, the Court grants Defendants' Motion to Dismiss as to the claim for Equitable Action to Rescind the Sale in Count V.

For the aforementioned reasons, the Court will grant Defendants' Motion to Dismiss.

An appropriate order shall issue.

/s/  
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Claude M. Hilton  
United States District Judge

Alexandria, Virginia  
September 4, 2013